IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10846 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BM PATEL

Versus

SUPERINTENDING ENGINEER

Appearance:

1. Special Civil Application No. 10846 of 2003

MR PINAKIN M RAVAL for Petitioner No. 1

MR HS MUNSHAW for Respondents

CORAM : HON'BLE MR.JUSTICE M.S.SHAH

Date of decision: 14/10/2004

ORAL JUDGEMENT

Rule. Mr.H.S.Munshaw, learned counsel waives service of Rule on behalf of the respondents.

2. What is challenged in this petition under Article 226 of the Constitution of India is the order dated 25.06.2003 [Annexure-H] passed by the Superintending Engineer, Public Health Circle [Zonal], Ahmedabad cancelling the order dated 21.9.1994 [Annexure-F] by which the petitioner was granted deemed date of 8.11.1988 for promotion to the post of Senior Clerk.

3. To appreciate the controversy involved in the petition, it is necessary to refer to the following facts.

The petitioner was appointed as a Typist under the respondent Board on 7.5.1982. On 31.8.1984 the seniority list of the Typist / Junior Clerks came to be published by the authority, wherein, the name of the petitioner was shown at Serial No.24. On 24.11.1986 the petitioner was selected for 99th P.W.D. Training Class by the concerned authority. However, the Deputy Executive Engineer under whom the petitioner was working, did not relieve the petitioner for the said training because the petitioner was engaged for special scarcity work and, informed the Head Office accordingly on 4.12.1986. The Chief Administrative Officer conveyed this fact to the State Government in R & B Department on 16.12.1986. Thereafter, by letter dated 2.8.1988, the petitioner was deputed for training in 106th P.W.D. Training Class which was to begin from 1.9.1988. The petitioner underwent the said training and passed the post training examination at the first attempt as per the result declared on 15.4.1989 [Annexure-D]. However, in the mean time on 8.11.1988 several of the petitioner's juniors were promoted as Senior Clerks on the ground that they had passed the examination which was held after training at 99th Training Class. After the petitioner passed the examination, the petitioner made representation in 1989 requesting the authorities to give the petitioner promotion with deemed date of 8.11.1988 when juniors to the petitioner were promoted. By order dated 21.9.1994, the respondent Board directed the Superintending Engineer to give the petitioner seniority in the cadre of Senior Clerks with effect from 8.11.1988 when the petitioner's juniors were promoted. This was done after recording the fact that when the juniors of the petitioner were sent for training, the petitioner could not be relieved because of urgent scarcity relief work. Pursuant to the aforesaid order of deemed date, the Superintending Engineer promoted the petitioner as Senior Clerk on 16.10.1988 with deemed date 8.11.1988. Thereafter, in November, 2003 the Superintending Engineer has passed the impugned order dated 25.6.2003

[Annexure-H] cancelling the previous order granting deemed date.

4. Mr.Pinakin Rawal, learned Counsel for the petitioner has challenged the said order dated 25.6.2003 [Annexure-H] on the following grounds:

[i] there is gross delay of nine years after the order was passed on 21.9.1994 for grant of deemed date to the petitioner;

[ii] the impugned order is passed without giving the petitioner an opportunity of being heard and therefore, the same is in violation of principles of natural justice;

[iii] thirdly on merits also, the petitioner has submitted that since the petitioner was not at fault when the petitioner was not relieved from the urgent scarcity relief work at the time when the petitioner's juniors were sent for training, the deemed date was rightly given on 21.9.1994 and therefore, the said order could not have been cancelled and hence the same is illegal, arbitrary and unreasonable.

5. On the other hand, Mr.H.S.Munshaw, learned counsel for the respondents has submitted that

[i] since the petitioner underwent post training Examination from 1.9.1988 and passed the post training examination as per the result declared on 15.4.1989, the petitioner was not eligible for promotion with effect from any prior date and, therefore, as per the Government [GAD] Resolution dated 26.3.2003, an employee cannot be given any deemed date which is prior to the date of his passing of requisite departmental examination. The petitioner was not eligible for promotion on 8.11.1988 as he had not passed the requisite departmental examination at that time.

[ii] Since the decision is based on the aforesaid resolution, it was not necessary to afford an opportunity of hearing to the petitioner.

[iii] If the deemed date granted earlier was not cancelled, it would have resulted into complications in the matter of seniority of Senior Clerks as persons who had passed the examination before the petitioner, would make a grievance.

[iv] On the basis of the date of clearance of departmental examination as 15.4.1989, the petitioner was eligible for promotion to the post of Senior Clerk on 19.5.2000. It is submitted that in view of the above, the impugned order is just and proper.

6. In Rejoinder, Mr.Rawal for the petitioner has submitted that the Government Resolution dated 26.3.2003 what become relevant if the petitioner on his own had not joined the training and passed the examination. It cannot apply where the higher authorities prevent the employee from attending training class because of the urgent work of the Board such as scarcity relief work. Mr.Rawal has further submitted that the petitioner and many of his juniors were deputed for the 99th Class but the petitioner was not allowed to join the said training class whereas the juniors were allowed and thereafter the petitioner's higher authority deputed the petitioner for training only for the 106th Class which commenced from September, 1988, hence the petitioner had no choice in the matter as no other persons from the office, where the petitioner was working, was deputed for such training for 100th Class to 105th Class.

7. Having heard the learned counsel for the parties, it appears to this Court that the petitioner has raised substantial contentions and if the respondent authority had given the petitioner a show cause notice and an opportunity of being heard, the petitioner would have been in a position to point out all the aforesaid relevant facts. This ground is sufficient to quash the impugned order.

8. Even so, there is one submission of Mr.Munshaw which is required to be dealt with. The Government Resolution dated 26.3.2003 provides that the question of promotion or deemed date cannot be considered till the employee has passed the departmental examination. While it is true that an employee would not be eligible for promotion till he passes the departmental examination, but if the employee is prevented from going for such training in 1986, and his juniors are permitted to go for such training, and the employee is thereafter deputed for such training in 1988 and passes the post training departmental examination at the first attempt, obviously, the employee cannot be denied his seniority in the higher promotional post, if his juniors are promoted in the mean time. The resolution does not prevent the question of consideration of deemed date of such an employee who had to suffer the anguish of supersession by his juniors without any fault on his part. Hence the Government

Resolution dated 26.3.2003 does not and can not take away the petitioner's right to be considered for deemed date of promotion on the aforesaid ground.

9. If the juniors to the petitioner were permitted to steal a march over the petitioner in 1988, they cannot be permitted to make a grievance about the deemed date given to the petitioner of 1988. In fact, the petitioner was given deemed date in 1994 and the impugned order has been passed in June, 2003, after delay of nine years. There is nothing to show that any complications have arisen on account of the deemed date of 8.11.1988 given to the petitioner by order dated 21.9.1994. Hence, the impugned order is quashed and set aside on the ground that the same was passed without issuing any show cause notice and without an opportunity of being heard to the petitioner. If, after considering the aforesaid findings and observations, the authorities are still of the view that notwithstanding such gross delay, question of deemed date already given in 1994 is still required to be reconsidered, then only the respondent authority shall issue a fresh show cause notice and give the petitioner an opportunity of being heard and in that case, the petitioner will be at liberty to raise the plea of gross delay and also other defences on merits.

10. Subject to aforesaid findings and observations, the impugned order dated 25.6.2003 at Annexure-H is quashed and set aside.

It is clarified that since the order dated 25.6.2003 at Annexure-H is set aside, the petitioner continues to be a Senior Clerk with deemed date of 8.11.1988.

Rule is made absolute accordingly with no order as to costs.

Date : 14.10.2004 [M.S.Shah, J.]

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